On appeal, the Sixth Circuit reversed the district court and held that 11 U.S.C. §329 did apply to Heavrin. The Sixth Circuit then held that Bankruptcy Judge Stosberg had not abused his discretion in requiring a 30% disgorgement of fees, stating "if anything" Bankruptcy Judge Stosberg had been "unduly generous to Heavrin" in requiring only the disgorgement of 30% of the monies he had received from TSR within one year before it filed its bankruptcy petition.

## REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit does not conflict with a decision of this Court or with a decision of any Court of Appeals. Further, the decision of the Sixth Circuit is consistent with other published opinions wherein the attorney subject to a disgorgement order performed legal services in contemplation of or in connection with the debtor's bankruptcy case although the attorney did not sign the debtor's bankruptcy petition.

Finally, the Sixth Circuit's decision is a correct application of law and effectuates Congress' intent, as expressed in the legislative history to 11 U.S.C. §329, that bankruptcy judges should give careful scrutiny to fees paid to attorneys who perform legal services for a debtor before the debtor files for bankruptcy protection.

### 1. There Is No Split In The Circuit Courts On The Questions Presented.

11 U.S.C. §329 states:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for

> compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

BRP 2016(b), which implements 11 U.S.C. §329(a), states:

> (b) *Disclosure of Compensation Paid or Promised to Attorney for Debtor.* Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

The fee disclosure requirements of 11 U.S.C. §329(a) and BRP 2016(b) have direct connection to the power of a bankruptcy judge to re-examine fees paid to an attorney and

to require under 11 U.S.C. §329(b) and BRP 2017 that some or all of those fees be disgorged.

11 U.S.C. §329(b) states:

> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to -
>
> (1) the estate, if the property transferred -
> (A) would have been property of the estate; or
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or
> (2) the entity that made such payment.

BRP 2017(a), which implements 11 U.S.C. §329(b), states:

> (a) *Payment or Transfer to Attorney Before Order for Relief.* On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

Thus, direct interplay exists between 11 U.S.C. §§329(a) and (b) and BRP 2016(b) and 2017(a). Congress took specific interest in the disclosure of a debtor's attorney fees for two reasons, as evidenced by the following legislative history relating to §329(a) of the Bankruptcy Code:

> Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.

H. Rep. No. 95-595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 39 (1978).

Numerous courts have stated that the disclosure requirements relating to attorney's fees are critical under our bankruptcy system. For instance, it was stated that the attorney fee disclosure requirements are "essential to effective exercise of the court's power to pass on fee applications." *In re Saturley,* 131 B.R. 509, 516 (Bankr., D. Me. 1991). The bankruptcy judge in *In re Mills,* 170 B.R. 404, 407 (Bankr., D. Ariz. 1994) wrote: "The bedrock of the attorney compensation scheme is the [Bankruptcy] Code's significant disclosure requirements." In *In re New England Caterers, Inc.,* 115 B.R. 724, 728 (Bankr., D. Mass 1989) the court stated: "The disclosure rules are the underpinning on which the integrity of the entire bankruptcy system rests. The Court has a need and right to expect from counsel full, unfettered disclosure of all fee and financial arrangements." Finally, in *In re Century Plaza Associates,* 154 B.R.349, 352 (Bankr., S.D. Fla. 1992), the court stated: "Disclosure of fees is a fundamental concept in bankruptcy and was of paramount import to Congress when enacting the Bankruptcy Code of 1978. Integrity is at the heart of the bankruptcy system and disrepute would result from inadequate disclosure, whether resulting from negligence or absent bad faith. (Citation omitted.)"

The interplay between §329(a) and §329(b) of the Bankruptcy Code and BRP 2016(b) and BRP 2017 requires full disclosure by attorneys of all payments to counsel for at

least one year before the filing of a bankruptcy petition because otherwise a bankruptcy judge would not have sufficient information to determine if the fees paid to counsel during the pre-bankruptcy process were "excessive." 11 U.S.C. §329(b); BRP 2017(a).[4]

Counsel for Heavrin ignores that no circuit court of appeals has ruled differently than did the Sixth Circuit in this case. Indeed, in the only other two published cases which have facts analogous to those of the case at bar, both courts ruled that the disclosure requirements of 11 U.S.C. §329 and BRP 2016(b) applied to the attorneys involved in those cases even though the subject attorneys did not act as counsel for the debtor during the bankruptcy case.

In *In re GIC Government Securities, Inc.*, 92 B.R. 525 (Bankr. M.D. Fla. 1988) (herein *GIC*), the debtor paid legal fees to two different attorneys within one year before the debtor filed bankruptcy. One of those attorneys, Anthony Labozetta, was general counsel for the corporation prior to bankruptcy and received $50,000.00 for legal services in an attempt "to forestall the State of Florida from revoking the securities registration of GIC which would have put GIC out of business." *GIC, supra* at 531. Jerome Berlin, an experienced Florida real estate lawyer, also received during the year before GIC filed for bankruptcy between $50,000.00

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[4] This is particularly true in the instant case because Heavrin was in a father/son relationship with Harrod, a principal of Triple S, who was the person who agreed to the $10,000.00 per month payment to Heavrin even though TSR was at the time the agreement was made in a rapid financial downward spiral and the $10,000.00 per month legal fee was five times the average monthly amount Heavrin normally billed to Triple S.

and $100,000.00 from GIC primarily for Berlin's actual or perceived political connections. The money transferred by GIC to Berlin was, "to be used by whatever means it appeared to be necessary, to avoid bankruptcy by prevailing on the office of the Comptroller [to] obtain a moratorium on its obligations to make the refund based on the consent decree. There is hardly any doubt that by the end of September this was the only viable alternative to GIC other than to seek relief in the Bankruptcy Court and invoke the protection of the automatic stay imposed by §362." *GIC, supra* at 533

Bankruptcy Judge Paskay in *GIC, supra*, concluded that both Messers. Labozetta and Berlin were required to disclose the fees paid to them within one year before GIC filed bankruptcy even though those attorneys were not debtor's counsel of record during the bankruptcy case. Bankruptcy Judge Paskay wrote:

> The jurisdiction of the Bankruptcy Court to re-examine the reasonableness of payments or transfers of properties by a debtor to an attorney in contemplation of bankruptcy is not new. Prior to the enactment of the Bankruptcy Code §60(d) of the Bankruptcy Act of 1898 specifically authorized the Court, even on its own motion, to re-examine payments made or properties transferred by a debtor to an attorney in contemplation of bankruptcy. This Section also authorized the trustee of the estate to recover the amounts found to be in excess of the reasonable fee. As stated by the Supreme Court in the landmark case interpreting this Section, *Conrad, Rubin & Lesser v. Pender,* 289 U.S. 472, 53 S.Ct. 703,77 L.Ed. 1327 (1933) that:

> "the manifest purpose of the provision is to safeguard the assets of those who are acting in contemplation of bankruptcy, so that these assets may be brought quickly and without unnecessary expense into the hands of the trustee, and to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services."
>
> Viewing the language of §329 in isolation, it might appear at first blush that the concept "in contemplation of" has been eliminated by Congress and the authority to re-examine was limited to payments made to an attorney who actually represented the debtor in a case under Title 11 or who represented the debtor in connection with such case. However, reading Bankruptcy Rule 2017 leaves no doubt that this was not the Congressional intent and the scope and the reach of the power to re-examine payments made or properties transferred by a debtor to his attorneys is the same as it existed prior to the adoption of the Code. From this, it follows that the principles enunciated by pre-Code cases interpreting §60( d) of the Bankruptcy Act of 1898 are still controlling.

*GIC*, *supra* at 529-530.

BRP 2017(a) does not limit a bankruptcy judge's ability to re-examine only those fees paid to the attorney directly involved in filing the bankruptcy case. Under BRP 2017(a) the bankruptcy judge can re-examine whether, "any payment of money . . .by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code . . . to an attorney for services rendered or to be rendered is excessive." (Emphasis added.) Thus, the bankruptcy court

had the right to re-examine whether the payments of any or all of the $153,477.71 which TSR paid to Heavrin within one year before TSR filed bankruptcy were excessive, and the Sixth Circuit properly affirmed that power of the bankruptcy court to require attorneys who performed legal services in contemplation of or in connection with a debtor's case to comply with 11 U.S.C. §329.

*In re Dixon*, 143 B.R. 671 (Bankr. N.D. Tex. 1992) is another case which supports the Sixth Circuit's ruling. In *Dixon*, the court held that any lawyer who receives payment for legal services from a debtor within one year before the bankruptcy petition is filed can have his or her fees re-examined by the bankruptcy court. In *Dixon, supra,* the debtor paid $300,000.00 to William Ravkind as a flat fee to represent the debtor in criminal proceedings which might be brought against the debtor. Mr. Ravkind did not act as debtor's counsel during the bankruptcy case. The bankruptcy court stated:

> Viewed in isolation, it might appear from the language of §329 that the Bankruptcy Court's authority to reexamine fee arrangements is limited to payments made to attorneys who actually represent the debtor in a case under Title 11, or who represented the debtor in connection with such a case. However, courts interpreting §329 and BR 2017, along with their statutory predecessors, leave no doubt that it was Congress' intent to permit the courts to reexamine the reasonableness of fees within the one-year look back period, irrespective of the nature of the services rendered. The United States Supreme Court, in *Conrad, Rubin & Lesser v. Pender, supra,* 289 U.S. at 476, 477, 53 S.Ct. at 704, 705, interpreting §60(d), stated:

> [60(d)] contains no intimation of an intention to limit the [Bankruptcy Court's] jurisdiction to reexamine [attorney fees] to a particular sort of legal services for the payment of which the debtor has disposed of his property.
>
> Recent cases decided under §329(a) of the Code have consistently interpreted it as broadly as §60(d) of the Act. See, *Matter of Kroh Bros. Development Co., supra* (Bankruptcy Court ordered criminal defense attorney to remit $7,000 of $25,000 retainer on grounds it was in excess of reasonable fee for services performed]; *In re GIC Government Securities, Inc., supra.*
>
> Notwithstanding the fact Defendant did not represent Dixon in his Chapter 11 proceeding, Defendant's fee arrangement is subject to scrutiny under §329(b) of the Code.

*Dixon, supra* at 676-677.

Thus, despite counsel for Heavrin's statements to the contrary, numerous courts which have addressed whether 11 U.S.C. §329, BRP 2016 and BRP 2017 apply to legal fees paid to attorneys who do not represent the debtor in its bankruptcy case have concluded that the disclosure requirements of those statutes and rules do apply.

**2. Payments Made To Heavrin By TSR Within One Year Before TSR Filed Its Chapter 11 Bankruptcy Petition Were Made "In Contemplation Of" Or "In Connection With" TSR's Bankruptcy Filing.**

In his argument to this Court counsel for Heavrin fails to analyze all the statutory language contained in §329(a) of the Bankruptcy Code. Congress specifically included within the scope of 11 U.S.C. §329(a):

> Any attorney representing a debtor. . .in connection with such a case . . .shall file with the court a statement of the compensation paid or agreed to be paid, if such payment . . .was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

Therefore, 11 U.S.C. §329(a), by its very language, applies to any payment made to an attorney representing a debtor within one year before the debtor filed its bankruptcy petition if the payment was made "in contemplation of" or "in connection with" the case.

This Court has previously held that legal services performed "in contemplation of" bankruptcy include those services intended to keep the client out of bankruptcy. In *Conrad, Rubin & Lesser v. Pender,* 289 U.S. 472 (1933) this Court specifically stated that, "negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of payment. A man is usually very much in contemplation of a result which he employs counsel to avoid." *Id.*, at 479 (internal quotes omitted).

In this case Heavrin testified at length about the legal services he provided to TSR within one year before TSR filed its Chapter 11 petition. Those legal services related to negotiations with creditors to restructure the debts of TSR, the defense of collection lawsuits, the defense of eviction lawsuits and other legal services designed to "keep [TSR] out of Chapter 11." (Pet. Apx. A11.) Thus, the fees paid by TSR to Heavrin within one year before TSR filed for bankruptcy protection were paid for services "in contemplation of" or "in connection with" TSR's bankruptcy case.

### 3. Heavrin Has Adamantly Refused To Comply With 11 U.S.C. §329(a) And BRP 2016(b).

Having established that Heavrin received payments from TSR within one year before TSR filed its Chapter 11 bankruptcy petition for legal services "in contemplation of" or "in connection with" TSR's Chapter 11 case, the next issue was: Did Heavrin comply with the fee disclosure requirements of 11 U.S.C. §329(a) and BRP 2016(b)? The answer is no. Heavrin has adamantly refused to file any disclosure statements in TSR's bankruptcy case.

Heavrin claims that the attorney fees he was paid by TSR were disclosed under the "payment to insiders" section of the bankruptcy petition. However, that claim was proven incorrect at trial. Further, the "source of the payment" requirement and the "fee sharing" requirement specified in 11 U.S.C. §329(a) and BRP 2016(b) were never disclosed in the bankruptcy petition.

It was only after TSR's trustee in bankruptcy sued Heavrin and discovery occurred that the full extent of Heavrin's failure to comply with 11 U.S.C. §329(a) and BRP 2016(b) became known. At trial it was demonstrated that: (a) Heavrin received

at least $164,477.31 in pre-petition fees from or on behalf of TSR not the $153,477.31 listed in the "payment to insiders" question contained in the bankruptcy petition; (b) Heavrin had agreed to share or had shared tens of thousands of dollars in attorney fees, none of which fee sharing arrangements was disclosed in the bankruptcy petition; and, (c) the "source of payments" of all of the fees Heavrin received from or on behalf of TSR was never identified in the bankruptcy petition.

In summary, the evidence at trial was overwhelming that Heavrin failed to comply with the disclosure requirements of §329(a) of the Bankruptcy Code and BRP 2016(b). Indeed, Heavrin adamantly refused, and continues to refuse, to comply with 11 U.S.C. §329(a) and BRP 2016(b).

**4. The Circuit Court Correctly Concluded That Bankruptcy Judge Stosberg Did Not Abuse His Discretion In Requiring Partial Disgorgement Of Fees.**

As demonstrated above, the fee disclosure requirements under 11 U.S.C. §329(a) and BRP 2016(b) are directly related to the ability of a bankruptcy judge to order disgorgement of part or all of the fees under 11 U.S.C. §329(b) and BRP 2017. In this case Bankruptcy Judge Stosberg had ample reason to require full disgorgement of the $153,477.71, which Heavrin admitted he received from or on behalf of TSR. The evidence at trial on this point included:

a. Heavrin adamantly refused to comply with the disclosure requirements of 11 U.S.C. §329(a) and BRP 2016(b), and still, to this day, has failed to comply with those requirements. The law is clear that if an attorney through intent or even negligence fails to make full disclosure under 11 U.S.C. §329(a)

and BRP 2016(b) full disgorgement of fees is permitted. In re Kisseberth, 273 F.3d 714, 721 (6th Cir. 2002); *In re Investment Bankers, Inc.*, 4 F.3d 1556 (10th Cir. 1993); *In re Downs*, 103 F.3d 472 (6th Cir. 1996); *Matter of Prudhomme*, 43 F.3d 1000 (5th Cir. 1995).

b. Heavrin failed to disclose at least $9,000 in fees paid to him by or on behalf of TSR within one year before TSR filed its Chapter 11 bankruptcy petition, which is a direct violation of 11 U.S.C. §329(a) and BRP 2016(b). *In re Smitty's Truck Stop, Inc* , 210 B.R. 844, 849 (10th Cir. BAP 1997).

c. Heavrin failed to disclose his extensive fee sharing arrangements with numerous attorneys who were not regular members or associates of his law firm, which is a direct violation of BRP 2016(b). *In re Dennis*, 164 B.R. 318, 320-321 (Bankr. D. Ariz. 1994).

d. Heavrin failed to disclose the source of payments of the monies he received relating to the legal services he provided to TSR, in direct violation of 11 U.S.C. §329(a). *In re Investment Bankers, Inc.*, 4 F.3d 1556, 1565 (10th Cir. 1993).

e. Heavrin had numerous conflicts of interest in representing TSR while charging TSR over $10,000 per month in legal fees. These conflicts included: Heavrin's representation of the Robert Harrod Irrevocable Trust and TSR concerning a $2 million life insurance policy on the life of Robert

Harrod.[5] *In re Angelika Films 57th, Inc.*, 246 B.R. 176, 180 (S.D. N.Y. 2000); *In re Chou-Chen Chemicals, Inc.*, 31 B.R. 842 (Bankr. W.D. Ky. 1983) (and cases cited therein).

f. Heavrin never provided the bankruptcy court with detailed time records relating to his legal services on behalf of TSR. Detailed time records are required to be submitted to provide the bankruptcy court with sufficient information to determine under BRP 2017 whether the legal fees paid were excessive. *See e.g. In re Mariner Post-Acute Network, Inc.*, 257 B.R. 723, 728 (Bankr. D. Del. 2000); *In re J. F. Wagner's Sons Co.*, 135 B.R. 264, 267-268 (Bankr. W.D. Ky. 1991).

g. Heavrin's legal services were not beneficial to the debtor's estate. The evidence is clear that TSR wanted to file a Chapter 11 bankruptcy petition in August, 1992. It was only Heavrin who persuaded TSR not to file its Chapter 11 bankruptcy petition in August, 1992. Had TSR filed its Chapter 11 bankruptcy petition in August, 1992 instead of September, 1994, TSR would not have lost

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[5] Heavrin personally benefitted through his breach of fiduciary duties to TSR because he received over $177,000 in settlement proceeds relating to claims which the Harrod Trust asserted as owner/beneficiary of the life policy. Heavrin's involvement in the transfer of TSR's interest in the life insurance policy to the Harrod Trust was the subject of a separate appeal filed at the Sixth Circuit. See, *Robert Harrod Irrevocable Trust v. Schilling*, Case No. 04-5194, wherein the Trustee's judgment against Heavrin and others was affirmed.

additional millions of dollars from its operation, thus, ensuring creditors a larger pay-out.

All of these reasons support Bankruptcy Judge Stosberg's decision to require Heavrin to disgorge 30% of the monies he received from TSR within one year before TSR filed its bankruptcy petition. From the above listing of violations of 11 U.S.C. §329 and BRP 2016(b), as well as other factors in this case, it is easy to understand why the Sixth Circuit ruled that Bankruptcy Judge Stosberg did not abuse his discretion in requiring a 30% disgorgement of the fees Heavrin received from TSR within one year before TSR filed for bankruptcy protection. In fact, the Sixth Circuit correctly concluded that, "the final order was, if anything, unduly generous to Heavrin. . . ." (Pet. Apx. A12.)

In summary, there is no reason for this Court to review the abuse of discretion issue in this case. There is no conflict in the Circuits on the abuse of discretion issue; and, numerous decisions support the bankruptcy court's decision requiring a 30% disgorgement of fees in this case.

**5. Heavrin Has Been Afforded Full Due Process Rights Through A Multi-Day Trial And Full Appellate Review.**

On pages 18-30 of the Petition for Writ of Certiorari, counsel contends that Heavrin has been deprived of his due process rights. Apparently, counsel for Heavrin believes that if he now asserts a "constitutional issue" he has a better chance for review from this Court. Notwithstanding counsel's argument, no constitutional issue is involved herein or has ever been previously argued in this case. Contrary to Petitioner's claims, Heavrin has been afforded full due process rights by all courts which have considered this matter.

First, Bankruptcy Judge Stosberg afforded Heavrin a full evidentiary hearing. The trial lasted several days. Heavrin testified and was afforded, through counsel, the right to cross-examine witnesses. Bankruptcy Judge Stosberg allowed full briefing by the parties. After full briefs were filed, Bankruptcy Judge Stosberg issued his written decision. Bankruptcy Judge Stosberg's decision reflects the correct application of law to the facts of the case. His decision, which was overly generous to Heavrin, is consistent with numerous other cases involving disgorgement of fees when an attorney fails to comply with the disclosure requirements of 11 U.S.C. §329(a) and BRP 2016(b).

Next, Heavrin's counsel's argument that the Sixth Circuit denied Heavrin due process because the panel issued its decision in an unpublished opinion is simply wrong. No constitutional implications exist by virtue of the Sixth Circuit's issuance of its well-reasoned and accurate decision through an unpublished opinion.

## CONCLUSION

For the foregoing reasons, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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